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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-994

EL PASO NATURAL GAS COMPANY,
Petitioner,

vs.

STATE OF ARIZONA, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF ARIZONA
En Banc

EL PASO NATURAL GAS COMPANY, a Delaware corporation,
Appellant,
v.
STATE OF ARIZONA, et al.
Appellees.

No. 13932

(Cause No. C-310694)
Appeal from the Superior Court of Maricopa County
The Honorable Philip W. Marquardt, Judge
Decided June 19, 1979

HAYS, Justice:

At issue in this case is the legality of two appropriations passed by the legislature and the consequent effect on the state property tax rate. We have jurisdiction pursuant to 17A A.R.S. Rules of the Supreme Court, rule 47(e)(5).

Plaintiff-appellant, El Paso Natural Gas Company, Inc. (El Paso), brought suit pursuant to A.R.S. § 42-204 to recover $990,659.23 of taxes, half of which were paid under protest. Defendant-appellees are the state of Arizona, the state treasurer, the state tax commission, individual members of that commission, the department of

revenue, the director of the department of revenue, all 14 counties and their respective treasurers. El Paso alleges that taxes were illegally levied for the Capital Outlay Stabilization Fund and Operating Reserve appropriations passed by the legislature for the fiscal year 1970-71.

In 1970 the Second Regular Session of the Twenty-ninth Legislature enacted a general appropriation bill which made appropriations for the various departments of the state for the fiscal year July 1, 1970, through June 30, 1971. 1970 Ariz. Sess. Laws, ch. 162. Subdivision 104 of that bill appropriated twelve million dollars to a "Capital Outlay Stabilization Fund" and Subdivision 105 appropriated twenty million dollars to an "Operating Reserve." *Id.* These two appropriations were included in determining the amount to be raised by taxes on real and personal property in order to meet the budget requirements of the state for the fiscal year ending June 30, 1971. The resulting tax rate was fixed at $1.65 per $100 of assessed valuation for the year 1970. El Paso alleges that had the defendant state tax commission* not computed the tax rate and levied taxes so as to raise, in addition to all other items in the general appropriation bill, the illegal sum of $32,000,000, the tax rate levied against real and personal property would have been $ .54 per $100 of assessed valuation.

This appeal presents a number of complex and difficult issues which for clarity and organizational purposes we summarize as follows:

1. Does the decision of the Court of Appeals in *State*

*The functions of setting the state property tax rate and levying the tax are now performed by the joint legislative tax committee and the department of revenue, respectively. A.R.S. § 42-108; A.R.S. § 42-108.01.

v. Arizona Public Service Co. foreclose El Paso's claim for relief?
2. Does res judicata apply to taxpayer lawsuits?
3. Do the appropriations violate Article 4, Part 2, § 20 of the Arizona Constitution?
4. Do the appropriations violate Article 9, § 3, ¶ 1 of the Arizona Constitution and A.R.S. § 42-108.01 (B)?
5. Do the appropriations violate Article 9, § 3, ¶ 2, and § 9 of the Arizona Constitution?
6. Do the appropriations violate the separation of powers doctrine as enunciated in Article 3 of the Arizona Constitution?
7. Do the appropriations accord with the Financial Code?
8. Has El Paso satisfied a condition precedent to bringing suit by paying its taxes under protest?

APS DECISION

Defendants contend that the decision of the Court of Appeals in *State v. Arizona Public Service Co.*, 24 Ariz. App. 601, 540 P.2d 727 (1975), *appeal dismissed*, 426 U.S. 931, 96 S.Ct. 2643, 49 L.Ed.2d 383 (1976), forecloses El Paso's claim for relief. Arizona Public Service Company (APS) brought suit in Maricopa County against the same defendants as in the present case, challenging the same appropriations and seeking recovery of its taxes attributable to the challenged appropriations. The defendants moved for judgment on the pleadings on the ground that APS had failed to allege that the resulting tax rate was so excessive as to be arbitrary or fraudulent. After this motion was denied by the trial court, both parties made cross-motions for summary judgment. The trial court granted APS's motion and held that the appropriations for the Capital Outlay Stabilization Fund and Operating Reserve were unconstitutional, that their inclusion in the general

appropriation bill resulted in an increase in the state tax rate of $1.11 per $100 assessed valuation, and therefore, that APS was entitled to recover the portion of its taxes attributable to the illegal increase. On appeal by the state, judgment was reversed. Based on our opinion in *Cochise County v. Southern Pacific Co.*, 99 Ariz. 385, 409 P.2d 549 (1966), the Court of Appeals held that "APS having failed to allege and prove that the alleged unconstitutional appropriation resulted in an excessive tax rate so as to be fraudulent or arbitrary, its complaint should have been dismissed." 24 Ariz. App. at 605, 540 P.2d at 731.

In *Cochise* the State Board of Equalization, which in 1959-60 set the property tax rate, unknowingly used incorrect figures furnished it by the State Superintendent of Public Instruction. The Superintendent had certified to the Board a computation based on average daily high school enrollment rather than average daily attendance as prescribed by A.R.S. § 15-1211. The resulting tax rate was $1.70 instead of $1.661. We held that the Board of Equalization in relying on the Superintendent's certification had not acted arbitrarily or fraudulently, nor was the resulting rate grossly excessive. 99 Ariz. at 393-94, 409 P.2d at 555.

Our decision in *Cochise* was based on the assumption that the Board, in carrying out its tax-setting power, had acted judicially. *See* 99 Ariz. at 391, 409 P.2d at 553. Judicial acts, however, are ones of discretion or judgment, whereas ministerial acts leave nothing to discretion for the duty and manner of performance are described with certainty. *Magma Copper Co. v. Arizona State Tax Commission*, 67 Ariz. 77, 85-86, 191 P.2d 169, 175 (1948); *Bryant v. Bryant*, 40 Ariz. 519, 521, 14 P.2d 712, 713 (1932). The Board of Equalization had no discretion as

to which figures it could use; the statute was explicit. Hence, the Board acted ministerially, not judicially.

Arbitrariness provides a proper yardstick for judging the actions of an administrative agency when they involve an exercise of discretion, *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 510 P.2d 42 (1973), but it has no application to cases dealing with ministerial duties or constitutional challenges. *See Maricopa County v. Southern Pacific Co.* 63 Ariz. 342, 346-57, 162 P.2d 619, 622 (1945). We therefore indicate that we prospectively overrule our holding in *Cochise* that a tax levy will not be set aside unless the tax rate is so excessive as to be arbitrary or fraudulent.

RES JUDICATA

At first blush, the defendants' reliance on the res judicata effects of the APS decision seems misplaced. The general rule in sustaining a plea of res judicata requires identity of the parties, the capacity in which they appear, the subject matter, and the cause of action, *Snow v. Kennedy*, 36 Ariz. 475, 488, 286 P. 930, 934, (1930). Only the first requirement presents any difficulty, for El Paso was not a party to the APS decision. Nevertheless, the defendants invoke the equitable doctrine of virtual representation to conclude that the APS decision is binding on El Paso as res judicata. Under that theory, commonly encountered in class actions, a judgment in favor of or against a party representing a general class operates as res judicata in favor of or against all who are thus represented. This general principle has been applied to litigation instituted by a taxpayer to determine a public right or matter of public interest so that any judgment rendered therein would bind all other taxpayers. *E.g., Williams v. Board of*

Supervisors of DeSoto County, 139 Miss. 78, 103 So. 812 (1925); *Seibert v. City of Columbia*, 461 S.W.2d 808 (Mo. 1971); *Anderson v. Jeannotte*, 96 N.W.2d 591 (N.D. 1959); *Gist v. Stamford Hospital District*, 557 S.W.2d 556 (Tex. Civ. App. 1977). "Of necessity, absent fraud or bad faith, all residents and taxpayers must be bound by the result of litigation of a public nature carried on by one in similar circumstances and having a common interest." *Seibert, supra*, at 811.

Although not denominated as such, this doctrine has been utilized in Arizona. In *Luhrs v. City of Phoenix*, 33 Ariz. 156, 262 P. 1002 (1928), a judgment in a taxpayer's suit was held conclusive as res judicata against another taxpayer in a subsequent suit when the matter could have been raised in the first suit. In another case, brought to recover taxes unlawfully assessed and collected, plaintiffs, who were not parties to a prior suit, were allowed to rely on the previous judgment to prevent the defendant from relitigating an issue that had been decided against it in the prior sut. *Martin v. Whiting*, 65 Ariz. 391, 181 P.2d 819 (1947). The *Whiting* court noted that "[p]laintiffs in the instant suits are not the same persons who were plaintiffs in the *Ross* case, *supra*, but in contemplation of law they are the same since all plaintiffs in these suits sued in their capacity as taxpayers." *Id.* at 394, 181 P.2d at 821. Since our decisions accord with the weight of authority, we conclude that when a taxpayer or property owner brings an action against the state or other governmental subdivision, in the absence of fraud or collusion, a judgment for or against the state or political subdivision, upon a matter of public and general interest, is binding and conclusive upon all other taxpayers and property owners similarly situated.

As the doctrine of virtual representation stands in derogation of the general rule that a judgment binds only parties before the court, application of the bar of res judicata in these circumstances demands the utmost caution. The judgment in the prior case must have been a final judgment rendered on the merits by a court of competent jurisdiction. *Hoff v. City of Mesa*, 86 Ariz. 259, 344 P.2d 1013 (1959). There being no question of jurisdiction, we focus on the merits and the finality of the judgment. The Court of Appeals directed that judgment be entered for the defendants because APS failed to allege and prove an essential element of its complaint, an element that we have now declared to be nonessential. Nevertheless, the APS decision may be validly used for res judicata purposes as summary judgments are final judgments on the merits. *Union Interchange, Inc. v. Van Aalsburg*. 102 Ariz. 461, 432 P.2d 589 (1967). Moreover, a judgment, although later determined by an appellate court to be erroneous, is nonetheless conclusive. *Stuart v. Winslow Elementary School District No. 1*, 100 Ariz. 375, 388, 414 P.2d 976, 985 (1966); *De Maio v. Lumbermens Mutual Casualty Co.*, 247 Md. 30, 34, 230 A.2d 279, 281 (1967); Restatement, Judgments § 48, comment a (1942). The decision of the Court of Appeals in *State v. Arizona Public Service Co., supra*, therefore, is determinative of El Paso's claim, and ordinarily, as res judicata, would preclude recovery.

Res judicata is a judicial doctrine grounded in public policy considerations to insure that at some point there will be an end to litigation. *Lee v. Johnson*, 70 Ariz. 122, 127, 216 P.2d 722, 725 (1950). We consider its application appropriate to the facts and law of this case. The judgment of the trial court is affirmed.

APPENDIX B

The respondents in this case are:

State of Arizona, Bart Fleming, State Treaurer of Arizona, State Tax Commission of Arizona and Waldo DeWitt and Robert Kennedy, members of and constituting the State Tax Commission of Arizona, Department of Revenue of Arizona, Richard B. Howland, Director of Department of Revenue of Arizona, Apache County, LaVere O. Connolly, Treasurer of Apache County, Cochise County, Louise E. Peters, Treasurer of Cochise County, Coconino County, Rose Stacy, Treasurer of Coconino County, Gila County, William V. Cunningham, Treasurer of Gila County, Graham County, Evelyr Hughes, Treasurer of Graham County, Greenlee County, Kittie Potter, Treasurer, of Greenlee County, Maricopa County, Glenn O. Stapley, Treasurer of Maricopa County, Mohave County, Grace Marlow, Treasurer of Mohave County, Navajo County, Raymond H. Randall, Treasurer of Navajo County, Pima County, James Lee Kirk, Treasurer of Pima County, Pinal County, Jim L. Turnbull, Treasurer of Pinal County, Santa Cruz County, Oscar H. Islas, Treasurer of Santa Cruz County, Yavapai County, Paul J. Wedepohl, Treasurer of Yavapai County, Yuma County, and Billy V. Walker, Treasurer of Yuma County.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, et al.
Appellants,

v.

ARIZONA PUBLIC SERVICE COMPANY, a corporation,
Appellee.

No. 1 CA-CIV 2354

Court of Appeals of Arizona,
Division 1,

Department B.
Oct. 2, 1975

Rehearing Denied Nov. 7, 1975.
Review Denied Dec. 16, 1975.

JACOBSON, Presiding Judge:

The basic issue in this appeal is whether a taxpayer may recover a portion of its tax bill for taxes paid under protest against an alleged unconstitutuional legislative appropriation which it is alleged contributed to an increase in those taxes.

Appellee, Arizona Public Service (APS), brought an action against the appellants, State of Arizona, the State Treasurer and the Tax Commission seeking a refund of $1,789,894.31 in property taxes for the year 1970 paid under protest. On cross-motions for summary judgment,

the trial court granted APS all the relief requested and this appeal followed.

The facts are not in dispute. In 1970, the Arizona Legislature passed a general appropriation bill (Chapter 162, Session Laws 1970). Included within this general appropriation bill were two items classified as the "Capital Outlay Stabilization Fund", to which an appropriation of $12,000,000.00 was made and the "Operating Reserve" to which an appropriation of $20,000,000.00 was made. These items were included within a total of $397,056,822.00 deemed necessary by the State to carry on the State's business for the fiscal year 1970.

In 1970, the State Tax Commission calculated the State tax rate necessary to raise these revenues as follows:

Appropriations:		$397,056.882.00
Sources of Revenue:		
Estimated receipts	$305,045,831.00	
Surplus	44,292,166.00	
Total		349,337,997.00
Amount to be raised by property tax		$ 47,718,325.00

Net assessed valuation = $2,890,568,666.00
$47,718,825.00 ÷ $2,890,568,666.00 = $ .0165 = $1.65 tax rate per $100 assessed valuation

In paying its tax bills for the year 1970, APS contended that the appropriations of $32,000,000.00 to the "Capital Outlay Stabilization Fund" and the "Operating Reserve" were unconstitutional appropriations and if these items were removed from the calculations of the state tax rate, the proper rate would be $ .54 per $100 assessed valuation. It therefore paid under protest all its taxes to the various

14 county treasurers for those amounts exceeding a billing based upon a 54¢ tax rate.

APS subsequently brought suit pursuant to A.R.S. § 42-204 (1956) to recover those taxes paid under protest.

The State's basic contention is that APS's complaint failed to state a claim for relief and thus should be dismissed. Specifically, the State contends the failure of APS to allege that the tax levy set by the State Tax Commission was so "grossly excessive as to be arbitrary or fraudulent" defeats its action. To adequately understand the State's argument in this regard, it is necessary to set forth the background underlying the legislature's creation of the "Capital Outlay Stabilization Fund" and the "Operating Reserve" accounts.

In 1970 and prior thereto, the State Tax Commission had the authority to estimate the amount of revenue to be received by the State from sources other than direct property taxation. A.R.S. § 42-108.01(A), (Supp.1974) Added Laws 1967, ch. 107 § 1, amended Laws 1974, ch. 150, § 5. These sources included "income tax", "sales tax", "gasoline tax", and so forth. As set forth in the above computation, these estimated revenues, together with any surplus, subtracted from the appropriation form the basis of the direct property tax rate. It was apparently the practice of the State Tax Commission for several years prior to 1970 to deliberately underestimate the amount of these expected revenues, in order to insure that fluctuating economic conditions which would directly affect the amount of sales tax, gasoline tax and income tax collected, did not result in the State being unable to meet its financial obligations. In the year 1970, the legislature concluded that a more sound fiscal policy would ensue if the State Tax Commis-

sion would estimate the anticipated revenues of the State accurately and to the best of its ability. In order to insure the fiscal soundness of the State's finances and hedge against unexpected economic downturns the legislature included within its appropriation bill "reserves" (the capital outlay stabilization fund and the operating reserve accounts).

For the year 1970, according to the affidavits presented, the State Tax Commission followed the legislature's directive and estimated the anticipated state revenues from sources other than the direct property tax to the best of its ability which, together with the "reserve" reflected in the legislative appropriations bill, resulted in a surplus for the year 1970-1971 of $31,031,920.00. This surplus compares with a surplus of $29,844,637.00 in 1968-69 and $44,147,683.00 in 1969-70.

Based upon these comparative surplus figures, the State contends that the court need not reach the issue of constitutionality of the particular appropriation involved because of two arguments: (1) The tax rate set by the Commission upon which APS paid its taxes under protest is not excessive compared to previous years and thus APS's complaint for refund must be dismissed; and (2) APS has not suffered a loss since the surplus generated for the year 1970-71 was carried over to the following year resulting in a lowering of the tax rate for that year from which APS benefited and therefore to allow APS to recover taxes for the year 1970 would result in a double recovery to APS.

The State's first argument is predicated upon the holding in *Cochise County v. Southern Pacific Co.*, 99 Ariz. 385, 409 P.2d 549 (1966). In this second *Cochise*

County v. Southern Pacific Co. case,[1] the facts were that the State Board of Equalization, which at that time set the state property tax rate, was advised by the State Superintendent of Public Instruction that the sum of $10,115,-170.00 was needed for high school education. This figure was based upon a computation using "average daily enrollment" figures for high school students. In fact, this figure was incorrect. The correct figure should have been based upon a computation using "average daily attendance" figures for high school students. The result was that the incorrect figure actually increased the taxes of the taxpayer in the amount of $24,902.92.

Under these facts, the Supreme Court (in a three to two decision) held in *Cochise* that:

> "The board of equalization has the duty of fixing the rate of levy for state taxes as prescribed in A.R.S. § 42-141 et seq. Unless this rate was so grossly excessive as to show it was arbitrary or fraudulent . . . such a levy cannot be set aside. Although the board acted on incorrect information, there is no showing that the rate was grossly excessive, or that the action of the board was in fact arbitrary or fraudulent." 99 Ariz. at 393-94, 409 P.2d at 555.

Based upon this holding, the State in this case argues that although the State Tax Commission may have acted on incorrect figures supplied to it by the legislature (conceding for the purpose of this argument that the legislative appropriation may have included unconstitutional appropriations) unless APS can show that the tax rate actually set was so excessive as to be arbitrary or fraudu-

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[1] The first *Cochise County v. Southern Pacific* case dealt with the constitutionality of discriminatory tax assessments. See *Southern Pacific Co. v. Cochise County*, 92 Ariz. 395. 377 P.2d 770 (1963).

lent, its action must fail. This element the State contends, APS failed to allege or prove.

APS counters this argument by contending that the second *Cochise* case is in reality a "discretionary" case rather than a "legality" case and points to the following language contained in *Maricopa County v. Southern Pacific Company,* 63, Ariz. 342, 162 P.2d 619 (1945) to support its contention that where the legality of the rate set is attacked, it need not allege or prove excessiveness amounting to fraudulent or arbitrary action:

> "A levy may be excessive either because it will result in the collection of a sum more than is needed, or because it is greater in amount or rate than the limit fixed by the constitution or a statute. In the first case, the courts rarely interfere, since the amount is largely in the discretion of the levying body.
>
> • • • • • •
>
> "As we construe the pleadings the amount of the levy, strictly speaking, is not an issue; hence the question of whether there was an abuse of discretion by the board of supervisors in fixing the budget and levy need not be determined. Plaintiff does not attack the rate of the levy, but confines its attack to the want of authority to make the levy." 63 Ariz. at 346-47, 162 P.2d at 622.

From this premise, APS argues that if it were attacking the discretionary actions of the Tax Commission in setting the rate for the year 1970, the holding in the second *Cochise* case would be applicable and it would have to show excessiveness amounting to fraudulent or arbitrary conduct. However, it argues it does not attack any discretionary act of the Commission but attacks the mechanical process of including within its mathematical computation illegal and unuconstitutional appropriation—in essence, the legality of the base from which the Tax Commission starts.

We agree that APS's position is logically sound. However, we have a great deal of difficulty in reconciling that logical position with the majority holding in *Cochise County v. Southern Pacific, supra.* While APS attempts to cast the second *Cochise* case in a discretionary category,, in reality what Southern Pacific was attacking was the illegality of the computation supplied by the Superintendent of Public Instruction, not the discretion of the Board of Equalization in setting the rate. However, the majority in the *Cochise* case held:

> "[W]e have held the board of equalization, in carrying out its tax-setting power, acts judically, and cannot be attacked in the absence of a showing that the board acted in bad faith, or so arbitrarily as to amount to constructive fraud.
>
> • • • • • •
>
> "Examination of the facts in the instant case shows that the state board of equalization did not act arbitrarily or fraudulently, because it acted as the statute directed on the certification of the state superintendent of public instruction." 99 Ariz. at 391-93, 409 P.2d at 553-555.

We find no rational difference between acting on the illegality of figures supplied by an executive agency as was done in *Cochise* and acting on the illegality of figures supplied by the legislature. Moreover, we do not see any rational difference between illegality arising from violation of a statute as was done by the Superintendent of Public Instruction in the *Cochise* case and illegality arising from violations of the constitution as is alleged in this case. If anything, the moral outrage is greater in completely disregarding a statute clear on its face, than in following a legislative enactment which carries with it a presumption of constitutionality.

In sum, we are unable to logically differentiate between the legal principles presented in the *Cochise* case with those presented here. This does not mean, however, that we agree with those principles. In our opinion, it is illogical to attribute discretionary functions to the State Tax Commission when dealing with its mechanical, mathematical function of setting a tax rate. Here the legislature supplied the State Tax Commission with a figure which was constitutionally proper or it was not. The Commission exercises no discretion whether to use that figure in setting up tax rates; it is statutorily mandated to do so. A.R.S. § 42-108.01 (as in effect 1970). This is a ministerial function. *State v. Airesearch Mfg. Co., Inc.*, 68 Ariz. 342, 206 P.2d 562 (1949). We would agree that if APO [*sic*] were alleging that the State Tax Commission had underestimated the anticipated revenues (in our opinion, a discretionary act of the commission) which resulted in a tax rate higher than was necessary to satisfy current state expenses, the rationale voiced by the majority holding in *Cochise* would logically apply and the complaining taxpayer should be required to show excessiveness in the tax rate amounting to fraudulent or arbitrary conduct. This is the holding of the cases cited by the majority in *Cochise* to support its reasoning. *See, United Globe Mines v. Gila County,* 12 Ariz. 217, 100 P. 774 (1909); *People ex rel. Thomson v. Chicago & N.W.R. Co.,* 397 Ill. 266, 73 N.E.2d 418 (1947); *State ex rel. and to Use of Johnson v. St. Louis-San Francisco Ry. Co.,* 315 Mo. 430, 286 S.W. 360 (1926), and *State ex rel. Woodward v. Peal,* 136 Kan. 136, 13 P.2d 302 (1932).

APS is not attacking this discretionary function (nor was Southern Pacific in the *Cochise* case). Rather, it is complaining that the figures supplied to it by the legislature over which it had no discretionary control contained

unconstitutional items and by reason of these alleged unconstitutional appropriations the tax rate was illegally set. Excessiveness in this context is not an issue—unconstitutionality of the legislative action is. Justice, in our opinion, should mandate that the constitutionality of the tax setting function should not depend upon wheteher the unconstitutionality results in an excessive tax rate. To do so condones unconstitutional legislative action, so long as no taxpayer is hurt excessively.

Be that as it may, we have previously indicated we can find no logical distinction between APS's position here and Southern Pacific's position in the second *Cochise* case. It is further our opinion that that case is controlling on the issues here and not having the power to overrule Supreme Court decisions, *McKay v. Industrial Commission,* 103 Ariz. 191, 438 P.2d 757 (1968), we must follow its mandate, leaving to the Supreme Court the decision of whether it should reconsider its holding.

Pursuant to the holding in *Cochise v. Southern Pacific, supra,* we hold that APS having failed to allege and prove that the alleged unconstitutional appropriation resulted in an excessive tax rate so as to be fraudulent or arbitrary, its complaint should have been dismissed.

The judgment of the trial court is reversed and the matter remanded with directions to enter judgment in favor of the State Tax Commission.

HAIRE, C. J., and EUBANK, J., concur.

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF ARIZONA

EL PASO NATURAL GAS COMPANY,
a Delaware corporation,
Appellant,

v.

STATE OF ARIZONA, et al.
Appellees.

No. 13932

MOTION FOR REHEARING

Appellant, El Paso Natural Gas Company ("El Paso"), pursuant to Rule 9(a) of the Rules of the Supreme Court, 17A A.R.S., moves for a rehearing on the decision of the Court filed on June 19, 1979, on the following grounds:

I

The doctrines of res judicata and virtual representation have no application to this suit.

II

The rule of law announced in the Court's opinion, and the application of the rule to this case, violate the due process clause of the United States Constitution.

DATED: July 5, 1979.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

The opinion of the Court, while expressly overruling the decision of the Court of Appeals in *State v. Arizona Public Service Co.*, 24 Ariz. App. 601, 540 P.2d 727 (1975), *appeal dismissed*, 426 U.S. 931 (1976) (hereafter *APS*), and the earlier opinion of this Court on which the Court of Appeals relied, *Cochise County v. Southern Pacific Co.*, 99 Ariz. 385, 409 P.2d 549 (1966), nevertheless holds that the trial court's granting of summary judgment in this case should be affirmed because *APS* is res judicata as to the present suit. While res judicata was briefed by both appellant and appellees in this case, the first reference to the doctrine of virtual representation came in the form of supplemental authority mailed by the Attorney General's office to counsel for El Paso on December 12, 1978. The oral argument in this case was held on December

14, 1978. Accordingly, El Paso has had no opportuninty to brief those issues upon which the Court's decision is based.

I. THE DOCTRINES OF RES JUDICATA AND VIRTUAL REPRESENTATION HAVE NO APPLICATION TO THIS SUIT.

A. *The defense of res judicata was waived by Appellees' failure to assert this defense in their answer to El Paso's Amended Complaint.*

Rule 8(d) of the Arizona Rules of Civil Procedure provides that res judicata and estoppel are affirmative defenses which must be set forth in a responsive pleading. Under Rule 12(i), a party waives all defenses not raised in his answer or in a Rule 12 motion, with certain inapplicable exceptions.

APS case was decided by the Court of Appeals on October 2, 1975. Rehearing was denied on November 7, 1975. El Paso filed its amended complaint, including the allegation which the Court of Appeals had held was necessary in a suit of this nature, on October 30, 1975. The amended answer of defendants Maricopa County and Stapley was filed December 2, 1975. The answer to the amended complaint of all other defendants was filed on December 8, 1975. Neither the amended answers, nor the original answers, asserted res judicata or estoppel as a defense. Accordingly, these defenses have been waived, and this Court may not base its decision upon such defenses.

B. *Application of res judicata via the doctrine of virtual representation is only proper in true "taxpayers' actions" and other true class suits.*

At page 6 of the opinion, the Court notes that, as a general rule, a plea of res judicata requires identity of the parties, the capacity in which they appear, the subject matter and the cause of action. While El Paso was not a party to the *APS* decision, the Court goes on to discuss the equitable doctrine of virtual representation. The Court states that this doctrine is "commonly encountered in class actions," and goes on to state that it makes a judgment in favor of or against a party representing a general class res judicata as to all persons thus represented.

This doctrine of virtual representation is not just "commonly" encountered in class actions. It is encountered *only* in class actions, and is nothing more than another way of stating who is bound by a judgment in a class action. This is made clear by the following quotation from 46 Am. Jur. 2d, *Judgments:*

§ 539. Class actions; virtual representation.

Under the so-called doctrine of class or virtual representation, one or more persons may be permitted to maintain or defend an action for themselves and various other persons similarly situated and interested, and an exception to the general rule that no persons are bound by a judgment except those who are parties or stand in privity with others who are parties exists in the case of persons who are so represented by persons on the record as parties. In such case, a judgment in favor of the parties representing the general class is operative under the doctrine of res judicata in favor of all who are thus represented, and a judgment aganist the partes representing the general class is operative against those represented. (footnotes omitted)

APS's suit was not in the nature of a class action. APS was suing solely for the recovery of the taxes which

it had paid under protest on the grounds that they were illegally collected. APS did not purport to represent the interests of anyone but APS. The doctrine of virtual representation simply has no application to an individual taxpayer's suit for a refund.

At page 8 of the opinion, the Court paraphrases the following statement found at § 540 of 46 Am. Jur. 2d, *Judgments:*

> The doctrine of virtual representation, resting as it does on principles of convenience and necessity in the administration of justice, and being in derogation of the general rule that a judicial decree does not bind persons not before the court, is applied with great caution. Where the reason for the rules does not exist, the rule itself will not be enforced. (footnotes omitted)

That same section, in discussing the cases in which virtual or class representation is applicable, goes on to state:

> Furthermore, a representative or class suit judgment which is binding on all members of a class must have been instituted or conducted as such; and a suit commenced and conducted as such; and a suit commenced and conducted as an action in personam against certain named parties cannot be converted into a class suit after the entry of judgment therein. Obviously, the doctrine of res judicata will not be applied on the theory of virtual representation where the original action is brought by a stranger to the subsequent action solely on his own behalf to protect his individual rights under a contract with the defendant. (footnotes omitted)

APS is a stranger to this action. It brought its suit against these defendants solely on its own behalf to protect its own rights. It did not purport to, and could not, bind El Paso.

This Court has properly applied the doctrine of class or virtual representation in earlier cases. One of these cases is *Grand International Brotherhood of Locomotive Engineers v. Mills*, 43 Ariz. 379, 31 P.2d 971 (1934). The facts in that case were quite complicated. Basically, the dispute centered around seniority rights of engineers and firemen employed by the Southern Pacific Company. Many of the Tucson District employees were dissatisfied with the terms of the agreement reached between their unions and the railroad. An engineer and a fireman each filed identical suits against their unions, the engineers and firemen of the Phoenix District, and the railroad. The complaints in these two suits:

> [S]pecifically set up that there were a large number of persons employed by the Company within the Tucson seniority district, who were similarly situated with the plaintiff, and had the same rights by reason of their seniority and the terms of their contract, and that *the suit was brought on behalf of plaintiff and all others similarly situated*. 43 Ariz. at 390. (emphasis supplied)

The cases were heard together on their merits, and judgment was entered against the plaintiffs. The judgment was not appealed.

Thereafter, Mills and two other firemen filed an almost identical suit against the same defendants. A substantially similar suit was also filed by two engineers. As the Court noted: "In none of these cases did the plaintiffs claim to appear for anyone except themselves."

The defendants raised the defense of res judicata, based upon the two earlier suits. The trial court overruled the defendants plea in bar, and tried the case with the aid

of a jury. The court then entered judgment in favor of the plaintiffs, and the defendants appealed.

In ruling on the res judicata defense, this Court discussed the principle of class representation at great length. The Court pointed out that class suits are basically justified only when the parties are too numerous and when there is a risk of inconsistent or contradictory judgments. The Court quoted from *Freeman on Judgments,* Vol. 1 § 436, page 952, as follows:

> In cases properly falling within this principle, *wherein members of a class sued or are sued on behalf of other members of a class* who have a common or general interest or are too numerous to be actual parties, the judgment or decree is conclusive for and against those members of the class who are thus represented, in the absence of fraud or collusion. 43 Ariz. at 407. (emphasis supplied)

The Court determined that the two earlier suits had indeed been true class suits, that the plaintiffs in the later suits were members of that class, and accordingly reversed with instructions to render judgment in favor of the defendants.

This basic principle, i.e. that virtual representation only applies where the previous judgment was a true class suit, is not changed merely because the suit involves taxation. The Court's statement, at page 6 of the opinion,that the general principle of virtual representation ". . . has been applied to litigation instituted by a taxpayer to determine a public right or matter of public interest so that any judgment rendered therein would bind all other taxpayers," is an overstatement of the rule. While many of the cases applying the doctrine of virtual representation do involve questions of taxation, res judicata effect has only been

given to those judgments resulting from true "taxpayers' actions." These taxpayers' actions are merely one type of true class suit. In 74 Am. Jur. 2d, *Taxpayers' Actions,* § 1, the following general statement is made about such suits:

> Taxpayers' actions are suits or proceedings brought by one or more taxpayers, *on behalf of themselves and as representatives of a class of taxpayers similarly situated* within a taxing district or area, upon a ground which is common to all members of the class, and for the purpose of seeking relief from illegal or unauthorized acts of public bodies or public officials which acts are injurious to their common interests as such taxpayers. (emphasis supplied)

And, in § 2 of the same treatise, the following statement is found:

> A taxpayers' action is essentially a class action by one or several members of a class of taxpayers, on behalf of themselves and all others in the class, upon a ground which is common to all the members of the class.

In short, a taxpayers' action is just one form of class action, and the doctrine of virtual representation may only be applied in true taxpayers' actions.

The requirement that the first suit by a taxpayer be a true class action is further discussed in § 62 of 74 Am. Jur. 2d, *Taxpayers' Actions.* That section is captioned "Judgment; res juudicata," and in general discussions the proposition that all members of a class are bound by a true taxpayers' action. However, at page 283, the following statement is made:

> The judgment in a taxpayer's proceeding is not conclusive on one having a peculiar interest in the subject matter different from that of taxpayers in general. More-

> over, a taxpayer is not concluded by the judgment in a prior proceeding involving the same question, to which neither he nor anyone having authority to represent taxpayers in general was a party.

El Paso was not a party to the *APS* case, and APS certainly did not have authority to represent taxpayers in general. In addition, El Paso has a peculiar interest in the subject matter of the litigation different from that of taxpayers in general: it seeks a recovery of the taxes that it paid under protest. Since only those few taxpayers who paid their 1970 taxes under protest may bring a suit for refund, this interest is clearly different from that of the interest of taxpayers in general.

This same distinction between true taxpayers' actions and suits which merely happen to involve a taxation issue, is found in all of the cases cited by this Court for its broad statement that all taxpayers are bound by any litigation determinative of a public right or involving a matter of public interest. In *Williams v. Board of Supervisors of DeSoto County*, 139 Miss. 78, 103 So. 812 (1925), the Supreme Court of Mississippi had before it, for the third time, a taxpayer's action which was identical to the two previous actions, except for the named plaintiffs. As to the previous cases, the Court stated:

> We deem it only necessary to say that both of the former cases as well as the present case involved the same cause, and each involved a public question. They were strictly public suits. 103 So. at 812.

The case of *Seibert v. City of Columbia*, 461 S.W.2d 808 (Mo. 1971), is, at best, a confused application of the doctrine of virtual representation. Both the law suits under consideration involved a challenge to an annexation of

territory by a city. The first suit was brought by residents of the city, challenging the annexation solely on procedural grounds. The second suit was brought by Mrs. Seibert and other residents of the annexed area, and challenged not only the procedure involved, but also the reasonableness of the annexation. While the court stated that these were not class actions, it went to great lengths to point out how a judgment in favor of the plaintiffs in the first case would necessarily have affected the interests of all residents, including those of the annexed areas. This is, in effect, a class action, and one where uniformity of result is necessary. The court discussed the doctrine of virtual representation, and held that the plaintiffs in the second suit were barred from attacking the validity of the annexation on the ground of procedural insufficiencies, since as to this issue the interests of the plaintiffs in both suits were the same, but held that the plaintiffs in the second suit did have a right to challenge the annexation on the grounds of reasonableness. As to this issue, the interests of the plaintiffs in the two suits were not the same. The court, by holding that the plaintiffs in the second suit were barred only from relitigating a particular issue, was actually applying the doctrine of collateral estoppel, and not res judicata. Collateral estoppel is only one facet of the principles underlying res judicata, but the two doctrines are frequently confused by the courts. *See Lee v. Johnson*, 70 Ariz. 122, 216 P.2d 722 (1950), which explains the distinction. Therefore, while the legal reasoning of the court in *Seibert* may be confused, the result is in accord with the general principles of virtual representation discussed above.

This general principle is much more clearly set forth in *Anderson v. Jeannotte*, 96 N.W.2d 591 (N.D. 1959), which was also cited in this Court's opinion. The court

there noted that the earlier suit, which the defendants claimed was entitled to res judicata effect, had been "brought by the plaintiff as a citizen and taxpayer . . . on his own behalf and on behalf of others similarly situated," and that the second suit was brought by plaintiffs who alleged that they were taxpayers and were bringing the action "in behalf of themselves and others similarly situated." 96 N.W.2d at 592.

In addition, *Anderson* was a suit for injunctive relief against public officials, and the court noted that:

> The right of the taxpayer to maintain an action to restrain public officers from unlawfully dissipating public funds is a right common to all taxpayers. 96 N.W.2d at 594.

In support of their position that they were not barred by the prior suit, the plaintiffs cited an older North Dakota decision which had held that no res judicata effect could be given via the doctrine of virtual representation to a mandamus proceeding brought by taxpayers of a school district to compel the district to construct a school house which would be attended by the plaintiff's children. The court distinguished the earlier case on the following grounds:

> The action was instituted in the name of the parents and did not purport to be brought in behalf of others similarly situated . . . . In that case, neither the plaintiffs nor the intervenors appeared to have been acting in behalf of the public. They were seeking to vindicate private and not public rights. The case is not in point. 96 N.W.2d at 594-595.

Both APS and El Paso sought to vindicate their private rights to a tax refund. Neither was acting in behalf of the

public. Accordingly, under the authority of one of the very cases cited by this Court, the doctrine of virtual representation has no application to the present suit.

The last non-Arizona case cited by the Court in support of its statement regarding the doctrine of virtual representation is *Gist v. Stamford Hospital District*, 557 S.W.2d 556 (Tex. Civ. App. 1977). This was the opinion that the State mailed to counsel for El Paso only two days before oral argument in this case. That opinion involved claims for both declaratory and injunctive relief. The court held that the plaintiffs were barred under the doctrine of virtual representation by a previous decision challenging the validity of the same ordinance. In support of its decision, the court quoted the following language from a decision of the Texas Supreme Court:

> [I]f the matter adjudicated affected the interests of the public as distinguished from the private interests of the citizens of this city, although not parties to the suit, all citizens are concluded thereby. 557 S.W.2d at 557.

This is the same distinction made in the above quoted portion of § 62 of Am. Jur. 2d, *Taxpayers' Actions*. Since the decision in *APS* affected merely the private interests of APS to recover its taxes paid under protest, the doctrine of virtual representation does not apply.

At page 7 of its opinion, the Court discusses two Arizona cases which have applied the doctrine of virtual representation, although not denominating it as such. As the Court itself notes, *Luhrs v. City of Phoenix*, 33 Ariz. 156, 262 P.2d 1002 (1928), was a taxpayer's suit. That it was a true taxpayer's action is made clear by the following statement in the opinion:

> The plaintiffs in the two cases, it is true, are different persons, but appellant admits that, in contemplation of law, they are the same, since both sued in their capacity as taxpaying electors. 33 Ariz. at 160.

The other Arizona case, *Martin v. Whiting*, 65 Ariz. 391, 181 P.2d 819 (1947), contains the following language:

> Plaintiffs in the instant suits are not the same persons who were plaintiffs in the [earlier case], but in contemplation of law they are the same since all plaintiffs in these suits sued in their capacity as taxpayers . . . . The determination in that case was for their benefit and the benefit of all taxpayers in that portion of District No. 16 that was attempted to be annexed to the High School District. 65 Ariz. at 394.

Actually, as discussed in Appellant's reply brief, the *Martin* decision is more properly viewed as an application of the doctrine of collateral estoppel by one who was not a party to the prior litigation against one who was a party and had a chance to fully litigate the particular issue. When viewed in this light, the case is simply an early application of the modern trend to abandon the mutuality requirement for the application of collateral estoppel, and the case does not really bear upon the issue of virtual representation.

C. *The judgment in APS was not on the merits for res judicata purposes.*

At page 8 of its opinion, the Court holds that the decision of the Court of Appeals in *APS* was a final judgment on the merits, even though it was incorrectly decided and it is now overruled. The Court states that a judgment is conclusive, although later determined by an appellate court to be erroneous, and cites, among other authorities, *Restatement of Judgments* § 48, comment a. While comment (a) does state that an erroneous judgment may be relied upon by a defendant in a subsequent suit brought by the plaintiff on the original cause of action, it goes on to give the following reasons for this rule:

> If it was erroneous, the plaintiff might have taken steps to have it set aside or reversed in the original proceeding. If he has not done so, or if his attempt to do so was unsuccessful, he cannot thereafter collaterally attack it.

El Paso was not a party to the *APS* suit and could not, under Rule 24 of the Rules of Civil Procedure, have intervened in APS's claim for a refund. Accordingly, El Paso cannot be faulted for not taking steps to have *APS* reversed in the original proceeding. El Paso's only option was to attempt to have the Court of Appeals or this Court overrule *APS*, and El Paso has been successful in obtaining that ruling.

When the true holding in *APS* is examined it can be seen that § 48 of the *Restatement of Judgments* simply does not apply. In *APS* the defendants moved in the trial court to dismiss the complaint for failure to state a claim on the grounds that APS had not alleged that the resulting tax rate was so excessive as to be arbitrary or fraudulent. This motion to dismiss was denied by the trial court, which subsequently granted APS's motion for summary judgment. Thus, the trial court held that the two challenged appropriations were unconstitutional and had in fact increased APS's taxes by the amount claimed. On appeal, the Court of Appeals never reconsidered these holdings of the trial court. Instead, it held that the excessiveness allegation was required by law, and therefore the defendants' motion to dismiss should have been granted. The remaining language regarding APS's failure to "prove" excessiveness was merely *dicta*.

Accordingly, the res judicata effect of *APS* is governed by § 50 of the *Restatement of Judgments.* Comment (c) to that section provides:

> *Failure to state a cause of action.* Even though the judgment for the defendant is based upon the failure of the plaintiff to state in his complaint facts sufficient to constitute a cause of action, the plaintiff is not necessarily precluded thereby from maintaining an action on his original cause of action. If his complaint in the later action contains further allegations, the omission of which made the complaint in the first action demurrable, the judgment in the first action is not a bar to the second action, although . . . he has failed to avail himself of permission to amend.

Therefore, even if El Paso could be held to have been a party to *APS* under the doctrine of virtual representation, El Paso would still be permitted to pursue its claim because it added to its complaint the single allegation which the Court of Appeals held APS had missed.

D. *The doctrine of virtual representation does not apply to litigation involving the State.*

The true defendant in this case is the State of Arizona. The challenged appropriations were State appropriations, and it was part of the State portion of the tax rate which was protested. The various counties were named merely because they acted as agents of the State in the collection of the State's portion of the 1970 taxes.

At page 7 of its opinion, the Court holds that the doctrine of virtual representation applies in the case of any judgment for or against the State or a political subdivision. However, no authority cited by the State, cited by the Court, nor found by counsel in researching this question,

has ever applied the doctrine of virtual representation to a state government or to a question of state taxation. All of the authorities limit the application of the doctrine to judgment for or against political subdivisions of a state. One of the broadest lists of necessary parties to the former suit to justify invoking the doctrine of virtual representation is found in *Seibert v. City of Columbia, supra,* 481 S.W.2d at 811. This list includes municipal corporations, counties, towns, schools or irrigation districts, or other governmental agencies or districts, or the boards of officers properly representing them. This Court's extension of the doctrine to a suit against the State is not justified by any prior law.

While it is not expressly stated in the cases, El Paso would suggest that the reason for this limitation is the fact that citizens of a small locality are much more likely to receive actual notice of the pendency of suits affecting their rights. This notice problem will be discussed further in Part II of this memorandum.

E. *It would be inequitable to apply the doctrine of virtual representation to El Paso on the facts of this case.*

As the Court noted in its opinion, the doctrine of virtual representation is an equitable doctrine. The Court also notes that, since it is in derogation of the common law, "application of the bar of res judicata in these circumstances demands the utmost caution." Nevertheless, the Court holds that *APS,* which on appeal never even reached the underlying merits of the claim and which was decided contrary to law, is a bar to the present suit by El Paso. El Paso would urge the Court to find that such application of the doctrine on these facts is inequitable, and therefore improper.

II. THE RULE OF LAW ANNOUNCED IN THE COURT'S OPINION, AND THE APPLICATION OF THE RULE TO THIS CASE, VIOLATE THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The express holding of the Court in this case begins at the bottom of page 7 of the Court's opinion. It is there held that:

> [W]e conclude that when a taxpayer or property owner brings an action against the state or other governmental subdivision, in the absence of fraud or collusion, a judgment for or against the state or political subdivision, upon a matter of public and general interest, is binding and conclusive upon all other taxpayers and property owners similarly situated.

This holding, both as a general proposition of law and as applied in this case, violates the due process guaranteed by the United States Constitution.

The Court is, in effect, holding that any time any individual sues the State or any political subdivision upon a matter of public and general interest, the individual has, by operation of law, created a class consisting of all other persons similarly situated. There is no requirement that the other persons have any notice whatsoever of the pendency of the first suit, or that the plaintiff and all others have the same interest at stake in litigation. For example, an individual may have paid a portion of his 1970 taxes under protest due to the effect of the capital outlay stabilization fund and operating reserve appropriations on the tax rate. He could then proceed *pro se* to file an action for a refund, and base his challenge on entirely different grounds than those raised by APS or El Paso. If the grounds

raised were frivolous or otherwise not proper legal grounds, summary judgment would quickly be entered against him. If not appealed, that would become final judgment. Under the Court's holding, that judgment would bar every other suit by every other taxpayer even though those suits had been commenced before the decision in the hypothetical case and even though the legal basis of the suit was entirely different.

While the above example may seem far fetched, it is a possible result of the Court's holding. Such a result would violate the United States Constitution.

In the well-known case of *Hansberry v. Lee*, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed 22 (1940), the United States Supreme Court discussed the interrelationship of the due process clause of the Constitution and the application of res judicata to persons who were not parties to the prior suit. The Court first stated the general principles of res judicata that one is not bound by a judgment in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. It further held that judicial action enforcing the former judgment against the person or property of the absent party is prohibited by the due process clause of the United States Constitution. 311 U.S. at 41.

The Court went on to state:

> To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. *Id.*

The Court discussed the various sorts of factors which have given rise to the necessity of class or representative suits, and stated that it would not adopt any particular rule for establishing the conclusiveness of judgments in class suits, but held:

> [T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interest of absent parties who are to be bound by it. 311 U.S. at 42.

The Court went on to hold:

> It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obligation. . . . It is qute another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representaton of absent parties in a class suit has not hitherto been thought to go so far. 311 U.S. at 44-45 (citations omitted)

In discussing the specific facts of the previous litigation involved, the Court made the following statement:

> The plaintiffs in the [previous case] sought to compel performance of the agreement in behalf of themselves and all others similarly situated. They did not designate the defendants in the suit as a class or seek any injunction or other relief against others than the named defendants, and the decree which was entered did not purport to bind others. In seeking to enforce the agreement the plaintiffs in that suit were not representing the petitioners here whose substantial interest is in resisting performance. The defendants in the first suit were not treated by the pleadings or decree as representing others or as foreclosing by their defense the rights of others; and, even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity. For a court in this situation to ascribe to either the plantiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and a responsibility which, in view of their dual interest it does not appear that they could readily discharge. 311 U.S. at 45-46.

The holding in this case permits precisely what the United States Supreme Court has forbidden. The holding is so broad that there is no guarantee whatsoever that other persons who would be bound by a prior judgment have any notice of the litigation or that they have the same interests in prosecuting or defending the litigation. No citation is needed for the proposition that the due process clause requires, at a minimum, notice and an opportunity to be heard. The Court's opinion does not adequately protect these constitutionally guaranteed rights.

The specific application of the doctrine of virtual representation to bar El Paso's claim in this case also violates the due process clause of the Constitution. The *Hansberry* decision stands for the proposition that judicial enforcement of a previous judgment against someone who was not a party to the previous judgment violates due process, except where there are appropriate judicial guar-

antees to insure that the earlier suit was a valid class suit. As was discussed in the first portion of this memorandum, APS did not sue on behalf of anyone other than APS. The judgment did not purport to bind anyone else. Accordingly, *APS* was not the sort of class suit which would permit its application as a bar to other litigaton, and the Court's holding therefore violates El Paso's rights guaranteed by the United States Constitution.

Nor may *APS* be used to support a plea of collateral estoppel. The application of collateral estoppel in a suit where there is not identity of parties from the prior litigation is thoroughly discussed in *Blonder-Tongue Labs. v. University Foundation*, 402 U.S. 313, 28 L. Ed. 2d 788, 91 S. Ct. 1434 (1971). In that case, the Supreme Court overruled one of its earlier decison which required identity of parties for the assertion of collateral estoppel. The older cases had required "mutuality of estoppel," i.e. that it was as available to the plaintiff as to the defendant, and this required identity of parties. The Court discussed the decline of the mutuality rule, and adopted the modern trend which permits a party to a suit to estop the other party from litigating a particular issue which was fully adjudicated in prior litigation involving the other party. As was discussed above and in El Paso's reply brief, this Court in effect adopted the modern trend in *Martin v. Whiting, supra*. The doctrine was expressly adopted by the Court of Appeals in *DiOrio v. City of Scottsdale*, 2 Ariz. App. 329, 408 P.2d 849 (1965).

However, all courts have expressly held that someone who was not a party to a prior litigation may not be collaterally estopped on the basis of the prior litigation. This rule is stated in *Blonder-Tongue* as follows:

> Some litigants—those who never appeared in any prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position. 402 U.S. at 329.

The Court of Appeals in *DiOrio* also held that such an application of collateral estoppel would violate due process. 2 Ariz. App. at 331-332.

In short, the *APS* decision is entitled to no binding effect in the present case. El Paso was not a party to the suit, it was not in privity to any party to the suit, and the suit was not a class suit. To hold that El Paso is barred by that decision clearly violates due process. If the *APS* decision is entitled to any res judicata or collateral estoppel effect, that effect should come to bear against the State, since the trial court in *APS* expressly held that the challenged appropriations were unconstitutional and resulted in an increase in the tax rate, and that decision has never been disturbed.

CONCLUSION

In conclusion, the decision of the Court properly held that *APS* was wrongly decided, and overruled that decision. *APS* is entitled to no res judicata or collateral estoppel effect in this case against El Paso, and to do so would violate the due process clause of the United States Constitution. With the overruling of *APS*, the one serious, though improper, hurdle to El Paso's recovery of its taxes has been removed. The briefs submitted to the Court and the oral argument before the Court have adequately demonstrated that the two challenged appropriations were unconstitutional and that their consideration resulted in a tripling

of the legal tax rate. Accordingly, the Court should reconsider its opinion, and reverse the judgment of the trial court with a direction that judgment be entered in favor of El Paso for the full amount claimed in its complaint.

APPENDIX E

EL PASO NATURAL GAS COMPANY, a Delaware corporation, *Appellant,* vs. STATE OF ARIZONA, et al. *Appellees.*	Supreme Court No. 13932 Court of Appeals No. 1 CA-CIV 4003 Maricopa County No. C-319694

The following action was taken by the Supreme Court of the State of Arizona on September 6, 1979 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED;

FURTHER ORDERED: Application for Permission to File Brief Amicus Curiae = DENIED."

MARYANN HOPKINS-YOUNG, Clerk
By Diana K. Bentley
Deputy Clerk